

September 29, 2006

Chairman Daniel L. Stewart  
New York State Commission of Correction  
80 Wolf Road, 4<sup>th</sup> Floor  
Albany, New York 12205

RE: In The Matter of Ralph Phillips

Dear Chairman Stewart:

Let me begin, as I did during our September 6<sup>th</sup> meeting in your office, by stating that I suspect that members of your staff utilized the “learning curve” associated with your recent appointment as Chairman to cause the premature release of an erroneous, misleading and vindictive “final report.” No New York State Sheriff recalls the release of any prior report without them first being given an opportunity to review the report and address any factual errors. Nor do any recall having reports sent to the media before they were sent to the agency made subject of the report.

I both recognize and appreciate the importance of the Commission of Correction and its legitimate role in establishing standards for correctional and detention facilities. I will also acknowledge that I, like my predecessor, rely to a significant degree, on the cycle audits conducted by your staff as a barometer of our detention facility performance. It is my opinion that this response will expose enough erroneous, biased and misleading statements to cause the issuance of an amended final report. I hope it will also cause you to question the responsible person’s intent when preparing and releasing this report. Was it to bring about necessary corrections or to cause unjustified embarrassment while undermining the public’s trust in an agency already recognized as being under funded and understaffed? The premature public release suggests the latter, particularly given that it was faxed to one media outlet more than 24 hours in advance upon their agreement to “play ball with us and not call the Sheriff until after 4:00 PM Friday when the report would be faxed to him.” The report was then faxed Friday, August 4, 2006 at 4:21 PM.

Ironically, an Associated Press article appearing in the Buffalo News on 9/25/06 contained a similar question asked by a representative of a NYS detention facility for young women. When the Human Rights Watch and American Civil Liberties Union released a report without sharing it with them, the State spokesperson was quoted as saying "We have to question their motives...to improve programming...or...to promote their own agenda."

Comments made in this response generally follow the same order in which the different subject material was first addressed in your report. I have attempted to make reference to page numbers and to subsequent additional pages on which the same subject matter is again mentioned. I must also advise you that this response might not be as complete as it might have been if we had received your agency's response to our August 7<sup>th</sup> & 15<sup>th</sup> FOIL requests, which I understand will be arriving soon. Of particular relevance was our inability to interview "unnamed" employees who allegedly were unable to answer questions or whose comments formed the basis of criticisms or conclusions in your report.

During our September 6<sup>th</sup> meeting in your office, I also addressed my concerns regarding the veracity of one or more of your staff members. Except for a few necessary exceptions, I will address those concerns in a separate letter.

### **Comments on Report**

There is nothing to substantiate that Inmate Phillips exited through a **hole** he had previously cut, although it is reasonable to conclude that he worked at this for small periods of time over more than a single day. (pg 1)

It is misleading to suggest that Phillips was able to escape because the officer assigned to the outdoor security post had taken a break. This is not, and has never been, a fixed observation post. It is a roving post that requires the officer to respond to several different buildings. The officer assigned to this post is required to respond to calls for service even if it results in an interruption of a "break." (pg 1, 26, 37)

There is nothing to substantiate that the microwave motion detector in the area from which Phillips escaped was malfunctioning or that it had been the subject of multiple complaints by staff. While there have been, and will continue to be, other equipment malfunctions, they have been addressed as appropriate and as allowed by budgeted or otherwise available resources. There also seems to be some question as to alarms being mandatory since many facilities in NYS do not have alarm systems at all. If in 1985 Erie County voluntarily elected to enhance the security of our facility with an alarm system, should we now be criticized if we allow any portion of it to fall into disrepair? Does this make our facility any less secure than facilities that never implemented a system to begin with?

Many of the reported system problems resulted from duplicate command input by staff members sitting next to each other in the control room. This was found to be the cause of "lockups" that can only be prevented by their coordination of work efforts. Control room personnel have been instructed accordingly.

In an apparent attempt to suggest that a malfunctioning alarm sensor contributed to this escape, your staff deliberately misrepresented the 6/22/06 post escape test of that system. They reported that of the 3 attempts made to trigger the alarm, only 2 were successful. Your staff member monitoring those tests was fully aware that the alarm zone was only entered twice, not 3 times. The first planned test was abandoned pending safety assurances that our staff member would not fall off the roof after sliding between the sensors.

It cannot be overlooked that the alarm system that your staff describes as “faulty” is the same system used to establish that an employee acknowledged an alarm and failed to take appropriate action. (pages 1, 32-38)

### **Discovery & Response**

Given the overall tone of your report, I suspect that the author’s comments that the 6:12 AM notification of surrounding police agencies one hour after Phillips was discovered **missing**, was meant to infer that it was untimely. (pg 2) If that was the intent, it should be noted that local police agencies would not be notified until it became apparent that the inmate had **escaped**. Along this line, the author later states that the 2:40 PM multi-state notification was “grievously late.” (pg 40) The author is apparently unaware of the requirements and operating procedures outlined in the NYSPIN Manual (Chapter 1, Section 6). NYS is broken into 10 regions, with the local State Police Troop Headquarters as the control point for each region. Upon receipt of a message addressed as “APTS” from individual agencies, the State Police redirects that message to all agencies within the region and determines if/when the message should be sent to other agencies outside the region. This is in no way critical of the State Police, whose decision was no doubt based upon an evaluation of elapsed time and the knowledge that a regional message included all police agencies within the eight western counties. Furthermore, had the Erie County Sheriff’s Office (hereinafter referred to as ECSO) been aware of any special relationships outside of our 8 county region, it would have been entered as “Special Attention...,” naming that geographic area. The New York State Police control point would have considered that when determining what additional areas should be notified. The NYSPIN requirements specific to this escape requires that the ECSO make an initial entry within 5 hours of discovery and within 48 hours of obtaining an arrest warrant. Our initial entry was within ½ hour of discovery, with the second entry occurring immediately upon issuance of the warrant. (pages 2, 40)

### **Classification and Assignment**

While I have a full appreciation for the tragic conduct of Inmate Phillips following his escape, those acts could not be predicted and should therefore not be considered when assessing the inmate’s classification and assignment prior to his escape. Given the information provided by NYS Parole or otherwise readily available to the ECSO, there is no basis to state that Phillips was negligently assigned as a kitchen worker or that he was classified incorrectly. (pg 2) It should first be noted that certain inmates at the Erie County Correctional Facility have been assigned to various work details under the supervision of civilian employees since the 1920’s,

including some outside of the fenced area. Furthermore, according to our most senior employees, alleged parole violators (like Phillips), without new criminal charges, have been assigned to the kitchen and similar work details for as far back as they can remember. This would not be true for adjudicated parole violators.

It should also be noted that according to the COC recommendation when the new correctional facility opened in the mid-1980's, inmates assigned to the kitchen could be supervised by civilians, and the assignment of sworn personnel to that area was not required. At this time I also note that while this was not the opinion of the current COC Commissioners, it was not reasonable to assume that the ECSO could staff a newly created post when we were already understaffed as a result of laying off personnel in April of 2005, followed by a legislative mandate that all vacancies occurring thereafter were automatically eliminated. We had only recently been able to recall those personnel and to restore staffing according to a timeframe agreed upon with the COC. Since no mandates were made as to which area of understaffing had to be addressed first, it would be logical to address those that have been longest in existence, rather than those recently created by a change in COC Commissioners. Furthermore, my assurances to County leaders that increasing our staffing levels would result in a financial savings by eliminating overtime did not allow for the assignment of new employees to a newly created post. It required that they be used to displace officers working overtime on already existing posts.

While I appreciate and solicit input from line personnel and their unions, their suggestions must be balanced against available resources as well as the recognition of their understandable desire to create additional union work. Your report indicates that union requests to assign a sworn officer to the kitchen date back to 1999. It should be noted that the facility was then under the direction of the County Executive and not the Sheriff. It should also be noted that if in fact those requests were on-going, they were also considered and rejected prior to the preset administration. It should also be noted that the most recent request, and the only one to have been made during my administration, was submitted on 3/28/06 and had not even reached my office by the time of the Phillips escape. (pg 6)

It should also be noted that NYS Parole provided no criminal history or background information when Inmate Phillips was brought to the Erie County Correctional Facility as an alleged parole violator. No new criminal charges were filed or even suggested. It is not logical to conclude that a parolee, deemed suitable for release to live and work relatively unsupervised in the community, is not suitable to work in a correctional facility kitchen. It is even more unfair for your author to conclude that the facility administration should have known that Phillips was "a dangerous felon (and) a threat to public and law enforcement safety" when NYS, after observing and evaluating this same individual for the last 10-12 years, released him to the general public.

Since the classification worksheet used by your staff to prepare your report was not available for my review, I cannot explain the differences in scores. However, I have reviewed the classification document used (and approved for use) by the ECSO, including the specific classification document prepared on Phillips. I have also reviewed the criminal history report supplied by NYS DCJS that was used to classify Phillips. According to the DCJS document,

Phillips had 7 misdemeanor convictions, 13 felony convictions, and one violent felony conviction. That same report stated that he had **no escape arrests or convictions** and that he had no failure to appear on charges or open warrants. While I agree that the classification form leaves some room for individual interpretation, Phillips was properly classified as a “12” or possibly a “13”. With either score, he would be classified as “Medium Security.” Your author apparently suggests that criminal history points should have been totaled for each different charge category for which the inmate had been convicted, resulting in a score of 10 under the criminal history subcategory, and a total score of 18, resulting in a maximum security classification. If this were the proper procedure, Phillips would have been given 2 points for each of his 7 misdemeanor convictions (14), 4 points for each of his 13 non-violent felony convictions (52), plus 5 more points for one violent felony for a score of 71, not 10 as suggested by your author. Our instructions are to select the highest score from each category on the classification form, not totals within each category. If your author’s manipulation of the classification work sheet was correct, an individual with one misdemeanor DWI conviction, followed by a second DWI conviction (a non-violent felony) would receive a classification score higher than an individual with a single violent felony conviction and equal to that of a repeat violent offender. Since that should never be the case, your author’s application of our classification work sheet is obviously wrong.

The report suggests that facility administrators gave conflicting accounts regarding the differences between medium and minimum classifications suggesting that we only use maximum and then anything else. We consider the Correctional Facility to be a medium security facility in which some housing areas are more secure than others. There is nothing problematic about that explanation, as long as additional considerations are made regarding special housing units and inmates with special needs. There was no showing or indication that those special circumstances were not being considered. (pg 2-5, 13-14)

Numerous pages of the report discussed our alleged failure to review Phillips’ classification before a work assignment or changing his housing assignment. This entire discussion ignores that the original classification placed Phillips as a medium security prisoner. Your report then cites the 3 situations in which a classification review is required, none of which apply to Phillips. However, had NYS Parole rendered a decision adjudicating Phillips as a parole violator (thereby making him a state ready inmate), and had they advised us of their determination, the change of inmate status would have resulted in a review of his classification and a denial or removal of a kitchen assignment since “state ready” inmates are not assigned there. Furthermore, the ECSO was never advised of the outcome (or probable outcome) of the March 1<sup>st</sup> revocation hearing. No decision was rendered until April 7th, 5 days after the escape. According to 7/15/06 and 7/23/06 Jamestown Post Journal articles, on 4/7/06 the Administrative Judge directed that Phillips be sent to the Willard Drug Treatment Center for 90 days, after which, assuming successful completion, his parole status would be restored. According to Willard’s web page, the facility is a drug treatment program for non-violent felony offenders. Phillips was not known to be a drug offender. It would also appear that whatever information was supplied to the Administrative Judge by NYS Parole prior to the April 7, 2006 decision did not result in an opinion that Phillips was “a dangerous felon (and) a threat to public and law enforcement safety” as claimed by your author (when asserting that the facility administrator should have recognized this).

It should be noted that NYS will only provide “full” reimbursement to the County for lodging costs of adjudicated parole violators remaining in our custody for more than 10 days following the County’s notification of the State that the inmate is now “state ready.” No considerations are made for delays resulting from another State agency (parole) not notifying us of their adjudication decision so that we could notify NYS Corrections. Furthermore, the State determines when the revocation hearings are conducted. Delays in scheduling hearings, rendering decisions and notifying the County all result in prolonging local incarceration at under-reimbursed County expense. It has been long suspected that the State deliberately delays their proceedings as a cost saving measure.

The report notes that Phillips was classified as medium on 1/11/06 (5 days after being brought to the facility). The original classification document also contains the inmate’s request for a work assignment. Despite Phillips’ original assignment to a more secure housing area (pending classification), his original classification made him eligible for a less secure housing area, as well as a kitchen assignment. The author then illogically suggests that the inmate was transferred to the kitchen work detail to resolve a grievance regarding food portions, a grievance that even the author agrees would be dismissed. Yet the same author suggests that Chief Heist attempted to conceal that grievance. (pg 5, 17 & 18)

The author claims that his inquiry into the grievance resulted from “multiple facility staff” conveying this impression. We are unable to re-interview them as to their basis for this opinion, or the possible misinterpretation or misrepresentation because they were not identified in the report. We question if these individuals were in a position to know, or if it was mere speculation on their part. The author claims that he asked if Phillips had complained about food and that Chief Heist stated he had not. Chief Heist told me his response was “not that I recall.” He stated that thereafter, he reviewed the grievance file and found that on 1/29/06, Phillips had complained about shortages on his meal tray and that after inquiring from the housing officer, he returned the grievance so the inmate could suggest some resolution. It was apparent from information gathered that contrary to standard procedures, the inmate had not brought the alleged shortage to the attention of the housing deputy immediately upon receipt of the meal, but rather after consuming what was provided. Chief Heist’s integrity should not be questioned based upon his lack of recollection of a frivolous grievance submitted almost 3 months prior, or his inability to connect that grievance to a specific inmate. There is no credible evidence to suggest that Chief Heist associated any inmates name with this type of grievance, and certainly such a grievance would not have involved a private meeting in the Chief of Operations’ office.

Despite assurances to the contrary from those most likely to know the truth, your author claims that a “substantial body of circumstantial evidence exists that strongly and creditably argues otherwise” (that the kitchen assignment was to resolve a grievance). The evidence was the 1/29/06 grievance, its 2/2/06 return as incomplete, the fact that Phillips was assigned to the kitchen on 2/3/06 “purportedly based upon his written request to work in the kitchen which cited a problem with his diet” (purportedly by who?), the author’s interview of a former inmate/kitchen worker with a criminal history far worse than Phillips who claims that Phillips stated he was assigned to the kitchen to resolve a grievance after being interviewed in Chief Heist’s office (hearsay), and our (undisputed) admission that an inmate was previously assigned to the kitchen to resolve a grievance about his religious diet (the easiest way to resolve a

complaint that while his meals met the religious mandates, they did not provide enough variety). Both Chief Heist and Lieutenant Leary deny that Phillips' grievance had anything to do with his assignment. The author concludes they are untruthful.

Were it not for the fact that this subject questions Chief Heist's and Lt. Leary's integrity, it would not even justify a reply. It is reasonable to conclude that inmates volunteer for unpaid work because there is some benefit to them. That kitchen workers have more control over their own menu, including portions and frequency is obvious. That most inmates request a kitchen assignment with these thoughts in mind is logical. Why would our staff admit it on one occasion and deny it on another? If a Chief showed so much concern over the inmate's grievance to interview him in his office, then why not document it back in January? If the inmate was being assigned to the kitchen on 2/3/06, then why would our personnel waste time questioning the housing deputy and preparing a written response to the inmate the day before? What reason would we have to conceal what even your staff recognizes as a frivolous grievance. It should be noted that your 2005 cycle audit of the food services and grievance procedures at the Correctional Facility found both areas to be in compliance. It is more logical to conclude that the inmate was never called to the Chief's office and that he was assigned to the kitchen because it was his "turn" based upon his request to work there, a request first noted on his classification papers on 1/11/06 – before any grievance was filed. It is more likely that the author wished to discredit Chief Heist because he has a history of challenging the opinion and conclusions of your staff based upon conflicting government opinions.

This is further evidenced by your author's response to a request for an explanation of training given to employees involved in the classification of inmates, based upon alleged "misapplication of classification theory and practice with consequent violations of Correction Law and state regulations set forth" in your report. Chief Heist explained that in May of 1999, he telephoned Ms. Kathleen Bertan, the COC training representative assigned for WNY, and inquired about the Classification Training Course. She called back stating that no courses were scheduled for the remainder of the year but that inasmuch as he was a certified COC/BMP instructor, he could provide instruction by reviewing the lesson plans with the new classification officer and perform on the job training by completing classification reviews with the trainee. Further, that after doing so she would forward the final exam to be returned to her for scoring. These instructions were followed, the exam was submitted and a certificate of completion, signed by COC Chairman Croce and Assistant Director Corliss, was forwarded to Lt. Leary. Your author describes Chief Heist's response as "anecdotal" and asserts that our failure to provide commission approved training is a violation, apparently ignoring that it was both approved and conducted exactly as directed by your own training representative. Most educators would agree that a personal one-on-one training program would provide the highest level of instruction. However, such programs are not as cost efficient as a higher teacher to student ratio. We needed to train a new classification officer, COC had no classes scheduled for the remainder of the year, and COC suggested, authorized and approved a one-on-one program. There was no "material misrepresentation" in the providing of classification instruction, and most importantly, the student passed your final exam. The revocation of Chief Heist's instructional certification and Lieutenant Leary's classification certification are unjustified and vindictive.

## **Staffing Levels**

A substantial portion of your report addressed understaffing, making considerable efforts to infer they declined after I became Sheriff (“since at least August 2005...”) when in fact your agency is fully aware that this condition has existed for more than 10 years (at least 3 Sheriffs) and has been the subject of ongoing correspondence between our agencies. To suggest that there was some doubt as to this condition prior to August of 2005 is a clear misrepresentation by the author and ignores widely recognized evidence to the contrary.

Inasmuch as your report concerns the escape of Ralph Phillips, the focus on staffing levels should concentrate on the time of the escape. I had no discussions with your personnel regarding this topic during the period of investigation covered by your report. All prior correspondence between our respective offices on this matter seemed to have been minimized in this report. Comments that our vacancy levels rose above 100 on occasion in 2005/2006 are misleading.

We must first address the difference between staffing levels and post assignments. With few exceptions, mandatory posts are always staffed. The regular use of overtime to fill mandated posts has been the subject of controversy for years. We have recently been successful in convincing the County Executive and Legislature that increasing our staffing levels would be less expensive than paying overtime to fill the mandatory posts. The recently mandated kitchen post is one exception that has already been addressed in this reply. Considerable overtime, not post abandonment, resulted from inadequate staffing, with the single noted exception being the newly created kitchen assignment.

Our staffing levels became most critical when the Erie County budget crisis resulted in layoffs in April of 2005, followed by a legislative resolution that all existing and future vacancies were to be eliminated from the budget upon occurrence. According to our records, we suffered the lowest number of employees in June of 2005. Thereafter, our staffing levels began to increase.

Throughout the late summer and early fall of 2005, our staffing levels were the subject of ongoing controversy with elected officials and the subject of regular news coverage. This reached a critical point in early September at which time we convinced the County Executive and Legislature that further loss of variances would result in outsourcing inmates to other counties at additional County expense without any substantial reduction in staffing demands or other financial savings. They then agreed to restore some positions. Copies of my letters to the County Executive, the Chairman of the Legislature and the Chairman of the Public Safety Committee were all forwarded to then COC Chairman Croce. Additional copies can be supplied if requested.

Our staffing levels increased again in both September and October of 2005. Following an 11/16/05 meeting which included COC personnel, the County Executive and ECSO personnel, we received a letter dated 11/21/05 from Chairman Croce detailing the Commission’s criteria for addressing full time staffing in four phases.



Phase One, by March 1, 2006: As reported in my 3/17/06 letter to then Chairman Croce, we actually surpassed the Phase One target level of 480 line staff by 8. In addition, we rehired 15 of the 17 budgeted part time employees. While we failed to fill 7 of the supervisory positions, we had obtained budgetary approval for 5 of them. Most people would agree that we were in substantial compliance with the Phase One mandate, having filled 514 out of 521 positions.

Phase Two, July 1, 2006: As reported in my 7/5/06 letter to Chairman Stewart, we had received COC approval to conduct a correctional training academy on August 14<sup>th</sup> at which time we anticipated hiring an additional 51 employees. We in fact hired 41 additional line personnel on 8/14, and 7 additional line personnel on 8/21, which, when combined to the 520 full time personnel already working on 7/1/06, surpassed the 543 target number, albeit 6 weeks late. However we still have not met the targeted supervisory staffing levels.

On 7/5/06 I also reported that Erie County had informed the New York State Office of Court Administration of our intention to end our contract to supply court officers as of 2/1/07. This was motivated in large part by my realization that our ability to maintain proper staffing levels in the Holding Center was negatively impacted by the requirement to backfill vacancies under the Court contract by transferring officers from the jail. While this did not immediately resolve understaffing in the jail, it will result in a more stable staffing level after the Court contract is eliminated.

Phase Three, by January 1, 2007, calls for a total of 570 employees assigned to our Jail Management Division. Phase Four, by July 1, 2007, calls for a total of 590 employees. We have requested authorization to increase our staffing levels to 597 in our 2007 budget. This request was submitted to the County Executive for budget review on 9/1/06. It should be forwarded to the County Legislature with his recommendations by 10/13/06. By County Charter, the Legislature must take action by 12/12/06. The Legislature has already received a copy of your report and this reply will also be forwarded to them.

### **Overcrowding**

A considerable portion of the report also addressed our overcrowded conditions, again suggesting that I was responsible. My efforts and attention to this condition is documented and widely recognized by other elected leaders. Unfortunately, no consensus has been reached as to how it should best be addressed.

In the way of background, according to published reports, between mid 1995 and mid 2004, the number of inmates housed in NYS run prisons went down by 3,557 (5%), while the number of inmates housed in county run facilities in NYS went up 2,226 (16%). While NYS closed prisons, 36 counties were forced to build new facilities at county expense. Another recent new article reported that NYS Corrections had won a legal battle to “double bunk” inmates while **closing** other housing units to save money. At the same time, COC is denying or revoking housing variances in county facilities, preventing them from doing the same thing. When I inquired on 9/6/06 about this conflicting practice, Commissioner Lamy explained it was because state prisoners were sentenced and ours were not (an apparent contradiction of a COC directive

to not separate inmates by sentence status). No answer was given when I asked if we could get approval to “double bunk” our sentenced inmates and parole violators.

Our daily average number of state ready inmates during 2004 and 2005 was 190, with approximately 100 additional parole violators. The total of these two categories is nearly equal to our excess population. NYS provides some reimbursement for some inmates at the rate of \$34 per day while our cost is approximately \$115 per day. This difference in rates is estimated to have cost Erie County approximately \$3.8 million in 2005. It is estimated that our inability to receive compensation for parole violators with new criminal charges and the delay between conviction and sentencing cost Erie County another \$3.6 million in 2005.

Within Erie County, the increase in our population was in un-sentenced prisoners. Factors that contributed to that increase include a reduction in the staffing levels within the Erie County District Attorney’s Office which has resulted in delayed criminal proceedings, a reduction of staff within the Central Police Crime Lab which delayed criminal proceedings, and most significantly, a reduction of staffing within the Probation Department which delayed sentencing after conviction and resulted in longer stays for those who would otherwise have been “state ready inmates.” Unfortunately, on too many occasions these inmates were accused of additional crimes while in our custody and could not be declared “state ready” until the additional charges were resolved. The loss of Public Works personnel in 2005 also contributed to some loss of housing space because of mechanical and maintenance problems. Most of these problems were directly tied to the 2005 budget crisis and remedial action was implemented during 2006.

During our 9/6/06 meeting in your office I inquired if NYS had any unused housing space in any of their facilities within Erie County that could be staffed and utilized by ECSO to alleviate our overcrowded condition. As stated then, it is unlikely that Erie County will be able to fund any new construction, but I am constantly alert for the possibility of using other available space that would be approved by COC. Some of my additional efforts to address this problem are outlined below.

Both my predecessor and I were active participants on a Jail Overcrowding Task Force as well as participants in Alternatives to Incarceration programs. Participants in these efforts included the County Executive, County Legislature, District Attorney, Probation personnel, as well as considerable judicial involvement. Solutions pursued included night court, video arraignment and additional proceedings, electronic monitoring, improved mental health services, alternatives to bail, increased utilization of appearance tickets, and the increased use of drug treatment and prevention/education programs. In September of 2006, the University of Buffalo Center for Governance agreed to assist in conducting a comprehensive study to identify all the causes of the population increase in order to determine which, if any, are correctable without compromising public safety. I have also cooperated with several consultant groups as they examined this condition, and on 3/1/06, along with several other Sheriffs, discussed the problems associated with housing parole violators and state ready inmates with Senator Nozzolio.

It is generally recognized across NYS that the various County Sheriffs have no taxing or revenue generating powers. Rather, other county officials appropriate our resources, thereby

controlling staffing levels as well as construction and maintenance projects of the County-owned buildings. Nonetheless, your author asserts that my “operation of a large jail complex in an egregiously overcrowded condition without any action to relieve such conditions of confinement; operation of those same facilities in a dangerously understaffed condition such that ...vacancies have risen above 100 on occasions in 2005/2006; intentional abandonment of mandated security posts (while only addressing one) ...negligent and apparently arbitrary inmate classification and housing area assignment adverse to the safety and security of the facility (alleging only one, and that was not correct) ....” alleging no exercise of authority up and down the line of authority and responsibility...”culminating in, and a proximate cause of the escape of an inmate that the facility administration knew or should have known was a dangerous felon, a threat to public and law enforcement safety...” rises to the level of “willful negligence and professional incompetence.” Such inflammatory comments ignore a body of evidence to the contrary and amounts to an erroneous, malicious and unjustifiable conduct worthy of immediate correction. Furthermore, your author, in his malicious zest, has combined two contradictory “culpable mental states.” According to respected and widely recognized legal opinions, one can act knowingly, intentionally, recklessly or with negligence, but one cannot be willfully negligent.

Some additional comments might be necessary for you to determine if corrections should be made to the final report, and if so, what corrections. Your author is unaware, unconcerned, or more likely has chosen not to inquire as to supervisory actions to hold employees accountable and responsible. The current administrative team has terminated more than 50 employees in the last 8 years, suspending and taking lesser disciplinary actions in countless others. The ECSO has taken dramatic steps to reduce employee absenteeism, monitor long time illnesses and force the retirement of employees who would never return to duty. These efforts have included lawsuits when NYS Retirement refused to grant retirements to these employees. Other county agencies have looked to us for assistance in handling such cases.

Contrary to assertions made by Commissioner Lamy during our 9/6/06 meeting, the COC did mandate that Erie County co-mingle our prisoners without regard to sentence status. Testimony to this effect was made before the Public Employees Relations Board by both Terrance Moran (that a classification system which divides inmates by their sentence status is not objective) and William Benjamin (that the classification system previously used prior to the implementation of a Unified Classification System was not in compliance with COC regulations, that the ECSO could not classify prisoners and then further divide them by sentence status). According to testimony during the PERB case, ECSO was notified of the COC violation prior to 7/8/02, and that the COC demanded that ECSO eliminate sentence status as a prerequisite to classification. This is brought up because of the ongoing conflict following the 2001 merger of the County Correctional Facility with the Sheriff’s Holding Center. This merger was meant to maximize the use of both work forces as well as all available housing units without regard to sentence status. After countless court appearances, the issue remains unresolved. When attempting, during our 9/6/06 meeting, to address the impact of conflicting legal mandates (a prior PERB ruling identifying each union’s work by sentence status and a COC mandate that inmates could not be classified, and therefore housed, by regard to their sentence status) I was informed that COC had made no such mandate. The eventual outcome of this case impacts maximum use of housing space and must be considered in determining our long range housing needs. It could also alleviate some duplication of supervisory positions.

Your author's assertion that he had observed safety and security infractions on earlier visits begs the question as to why they were not brought to our attention. One of the investigating members of your staff has previously objected to the presence of one of our officers during his cycle visits because that officer routinely corrected problems as they were encountered, eliminating his ability to write up the infraction (rather than simply noting that the problem was corrected at time of discovery?). If these observations were in fact made, and these conditions contributed to the Phillips' escape, then I submit his delay in bringing them to our attention contributed to the escape. Such conduct, by a professional member of the criminal justice field would be most egregious; recognizing a potential threat to security and failing to immediately bring it to the attention of appropriate personnel.

While I do not recall the date being mentioned in this report, Mr. McGeary toured the kitchen and storage areas at our Correctional Facility one week before the escape. According to my staff, he said nothing about the spare or unused equipment in the kitchen area, but he did discuss a hole in the ceiling above the dishwasher (not the roof as stated in this report). He also asked the kitchen supervisor about the boxes stored on top of the cooler and upon being told they contained cookies and coffee, he responded "okay." Furthermore, I was present during the post escape discussion regarding the storage area on top of the cooler. Mr. McGeary directed that a solid wall be built over the cooler. Capt Bienko then suggested that a fence would be more appropriate and Mr. McGeary conceded. (pg 9, 21)

On 4/5/06 I received a fax from Mr. Michael Donegan, COC Counsel, requesting certain records while alleging that a prior request had been denied by my administration. I contacted Superintendent Livingston to inquire about this. Mr. McGeary and Mr. William Benjamin were at the Correctional Facility and responded to the Superintendent's office with Captain Bienko. When asked what documents were requested and denied, Mr. McGeary responded that nothing had been withheld, but that he knew how our office was and that this was just a "preemptive shot." If nothing else, this comment should explain our unwillingness to accept the undocumented conclusions and assertions of Mr. McGeary, such as the assertion that he made multiple requests to view the contents of a secured trash container but the key could not be located for 2 weeks. (p 27)

In addition to comments made on the first page of this reply, I also rely upon other independent individuals when assessing the condition within our detention facilities. These include letters from inmate family members, and comments from individuals who have toured the facility, including regular visits from judicial personnel. One such letter followed a late March inspection by one of our County Court Judges in which he stated that both facilities appeared to be well run, but overcrowded. He then addressed delayed pre sentence reports by probation officers as a major contributing factor to this condition. That letter is available upon request.

The author also cites 2 prior incidents in the kitchen area as indicators of a security threat. At least one of those incidents was previously reported to COC, who apparently was satisfied with the response taken at the time of the incident. The first incident occurred in May of 2005. Line staff noted unusual behavior of an inmate and further investigated. The inmate's "condition" did not indicate that he consumed alcohol in the kitchen (as stated in your report).

However, our investigation following the observation did establish that. The second incident occurred on 2/13/06, allegedly following a tip that homemade alcohol was being made in the kitchen. The author properly notes that shift summary reports were sent to command personnel on both occasions, but provides no comments about those reports or why they were used.

Shift summary reports were implemented by me to ensure timely awareness of all significant occurrences within the detention facilities and to be certain that incident report numbers were assigned when appropriate (as one form of supervisory accountability up and down the chain of command). It was also used as a form of checks and balances to make sure that incident reports were prepared and submitted in a timely manner. The shift summary report consists of a brief, one or two line statement describing an unusual event and the incident number assigned to it. The report is an internal mandate, not required by COC. It serves different purposes at various supervisory levels. If the author actually reviewed these daily briefings, he apparently overlooked that the 5/19/05 briefing made no mention of contraband being found. That report focused on the intoxicated inmate. It should be noted that newly arriving inmates have been found to arrive intoxicated, particularly those coming in as unsentenced prisoners. That incident was considered "reportable" to COC in large part because the inmate was removed from the facility and treated at a medical facility. The source of alcohol was actually discovered during a follow-up investigation. The second incident reports that during a kitchen search, several containers of fruit, liquid and bread were found in various places in the kitchen and kitchen storeroom.

Different conclusions can easily be drawn from the review of these incident reports. Certainly it is not unreasonable to conclude that both reports suggest that staff members, in the proper performance of expected duties, made observations or obtained information that caused further inquiry and the discovery of contraband or the precursors of contraband, and that they were properly dealt with. A supervisor reviewing these reports could reasonably deduce that staff members were routinely conducting searches of areas in which such materials are secreted.

In preparation for responding to this report, I asked why a COC report was not sent on the more recent discovery. It was explained that the liquid concoction appeared to have been only recently prepared and no fermentation process had occurred. Furthermore, a mere mention that fruit, sugar, or potato "consumption" had increased would result in such a search. When such substances are found, they are routinely discarded and not reported to COC. This will be addressed differently in the future. According to the supervisor on this incident, the metal objects were stored soup spoons and ladles that were not felt to constitute weapons given other similar materials frequently found within the kitchen. Such storage has been discontinued and will be addressed differently in the future.

The more detailed Incident Reports for these incidents are routinely forwarded to the Undersheriff, but not to the Sheriff. They are required to be reviewed and filed in the Jail Administrator's Office. The incident reports on both of these incidents could reasonably be used to conclude that staff members were properly performing their duties. However, the escape incident has made it apparent that a policy is required to ensure that contraband searches are conducted routinely and with more frequency, and that records are kept documenting such.

## **RESPONSE TO ACTIONS REQUIRED**

(1) I am not yet willing to accept that any executive or managerial negligence or professional incompetence existed or occurred. However, I acknowledge that there is always room for improvement, and that has been a constant and ongoing quest. Staffing levels have been addressed and ongoing efforts will continue as previously addressed in this reply. An appropriate chain of command with accountability up and down is already in operation. Corrective measures have been taken to ensure records storage and retention to better establish supervisory involvement. Duties and responsibilities of all supervisors have been reviewed and reduced to writing, with the understanding that disciplinary action will be taken as appropriate. Regular meetings of Command Staff and supervisors have been ongoing and corrective steps have been taken to ensure documentation of their occurrence.

(2) Except in rare occurrences, all new admissions are already occurring at the Holding Center. The exceptions are individuals reporting to the Correctional Facility to commence a “weekend” sentence, and the occasional delivery of a sentenced inmate by a police agency directly to this facility. Efforts will continue to eliminate even these rare occurrences. We prefer to conduct all initial classifications at the Holding Center.

(3) We have policies and procedures for the proper classification and re-classification of inmates. Corrective steps have been taken to ensure documentation of such applications. However, it should be noted that Section 7013.6, which provides for the co-mingling of inmates without regard to their classification status under certain circumstances (including work assignments), appears to have been ignored in your report.

(4 & 5) With the exception of disciplinary and special housing, all housing units at the Correctional Facility are considered to be medium security. Any inmate with a maximum security classification will be housed at the Holding Center. No inmate classification score will be altered without review. The criteria for any special housing units, including those related to work assignments, has been reduced to writing.

(6) Classification documents will accompany all inmate transfers between facilities. The facility medical director is addressing the similar transfer of medical records. State Correctional facilities will be contacted when developing these procedures to determine what measures are used to protect the confidentiality of medical records in transit.

(7) Our classification document considers the entire criminal history of each inmate. Unless informed to the contrary, we will continue to use our classification document as previously explained in this reply.

(8) I request further discussion and explanation of your interpretations of the standard. If an inmate, who has been properly classified and placed into a housing unit suitable for that classification, is later considered for a work assignment available to inmates with that classification score, and a housing unit appropriate for inmates with that classification score has been designated for inmates assigned to such work assignments, why would it be necessary to conduct a classification review before assigning the inmate to that work assignment and

corresponding housing unit? Is it the intent of the standard to require documentation that the classification score was consulted or considered to be certain that the inmate already has the necessary classification score? Page 14 of your report repeats the 3 circumstances in which a classification review is required. None seem to apply to the situation I have described. Furthermore, our understanding of Section 7013.6 allows for co-mingling of inmates on work details without regard to classification scores. The entire issue might be moot upon your acceptance of our assurances that no maximum security prisoner will be housed at the Correctional Facility and no state ready inmates or adjudicated parole violators will be assigned to work details. In the interim, our personnel have been instructed to maintain better files on inmate work assignments and housing unit transfers to document that the inmate's classification was "considered" before the inmate can be assigned to any work detail or different housing unit.

(9) I will not concede that there was any material misrepresentation in the matter of classification instruction and maintain it was conducted according to the direction of COC personnel at the time. However, this issue may be moot or minimized, given our commitment to conducting all initial classifications at the Holding Center. The issue of classification review would still need to be addressed.

(10) The Superintendent has been reminded of his responsibility to conduct annual reviews of all policies and procedures and to cause them to be updated as necessary.

(11) The grievance coordinator has been informed that written determinations must be prepared for all grievances that articulate a complaint with objective facts and clarity.

(12) All doors and gates are secured unless otherwise necessary and appropriate.

(13) A policy has been developed and implemented defining the duties of food service personnel and kitchen security staff.

(14) A policy has been developed and implemented regarding kitchen tool control and the handling of kitchen waste products.

(15) A policy has been developed and implemented regarding the search of inmate workers upon leaving or re-entering the kitchen.

(16) As acknowledged in Action Item 1, appropriate managerial and supervisory personnel have been reminded of their duties to thoroughly examine the circumstances surrounding serious or problematic incidents and to properly document such efforts, as well as the corrective measures that have been taken. Regular meetings of Command Staff and supervisors will include discussions of these incidents.

(17 & 18) Efforts to repair or replace inoperable security equipment are ongoing with the assistance of the Erie County Department of Public Works. A policy has been developed and implemented regarding regular testing of this system, as well as better record-keeping documenting such tests and their results.

(19) Correctional Facility and Police Services personnel are in the process of reviewing the emergency response plans in conjunction with N.I.M.S. We anticipate conducting and/or participating in emergency exercises in conjunction with a nearby state correctional facility as part of this emergency preparedness plan.

### **RESPONSE TO RECOMMENDATIONS**

We acknowledge recommendations 1-7 and will give each due consideration. Recommendation #1 will be implemented as much as possible as part of Action Item 6. It is my opinion that recommendation #2 fails to properly consider the difficulty of a single officer maintaining order in an open dormitory housing area with 48 or more inmates. If a problem or disturbance occurs in one section of such open dormitory housing units, order cannot be properly maintained without the prior assignment of a second housing officer. Further consideration will be given to firearms and chemical agent training as part of Action Item 19; however, the current and anticipated role of Correctional Facility personnel in an emergency outside the facility, such as an escape, is to maintain observatory posts.

Very truly yours,

TIMOTHY B. HOWARD  
SHERIFF OF ERIE COUNTY